

**BEFORE THE WORKERS COMPENSATION APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**MICHAEL SWINDLE**  
Claimant

V.

**RUBBERMAID SPECIALTY PRODUCTS**  
Self-insured Respondent

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Docket No. 1,070,963

**ORDER**

Respondent and insurance carrier (respondent) request review of Administrative Law Judge Gary K. Jones' October 15, 2014 preliminary hearing Order. W. Walter Craig, of Wichita, appeared for claimant. Terry J. Torline, of Wichita, appeared for respondent.

The record is the preliminary hearing transcript with attached exhibits, the claimant's evidentiary deposition with attached exhibits, and pleadings filed with the Division.

**ISSUES**

Claimant sustained an accidental injury to his left knee which arose out of and in the course of his employment on August 14, 2014. The judge concluded claimant was not terminated or placed on leave for cause. The judge ordered payment of temporary total disability benefits (TTD) starting September 25, 2014.

Respondent argues the judge exceeded his authority in granting TTD because: (1) claimant was not terminated for cause and (2) therefore, the judge's opinion that claimant was entitled to TTD because he was not terminated for cause is an impermissible advisory opinion.

The only issue for determination is whether the Board has jurisdiction to address whether the judge exceeded his jurisdiction in awarding TTD.

**FINDINGS OF FACT**

Claimant began working for respondent, through a temporary agency, on May 28, 2013, and became an actual employee on March 30, 2014. Claimant was able to perform his job as a warehouse worker without accommodation or restrictions.

On August 14, 2014, claimant sustained a left knee injury while getting off a forklift. Thereafter, he received medical treatment. On October 2, 2014, claimant was released to return to work with temporary restrictions for his left knee injury. Respondent provided claimant with accommodated work.

Claimant previously sustained a work-related back injury on February 1, 2010, which resulted in an April 28, 2011 settlement. At that time, three medical reports were admitted into evidence. Drs. Hufford and Stein placed permanent work restrictions on claimant and Dr. Goel indicated claimant needed no restrictions.<sup>1</sup> Respondent asserts claimant failed to mention any permanent work restrictions when hired.

On September 25, 2014, respondent sent claimant a letter stating they had recently learned about his permanent low back injury restrictions and could no longer provide accommodated work. Respondent gave claimant 30 days to provide releases from both Drs. Hufford and Stein or he would be placed on long-term leave.<sup>2</sup> Claimant was placed on long-term leave effective September 25, 2014. In an October 3, 2014 letter, respondent's Safety Manager stated respondent "could have accommodated" claimant's temporary restrictions if not for his separation from employment.<sup>3</sup>

On October 8, 2014, respondent provided written argument to the judge which stated claimant had yet to be terminated and was still an employee. Respondent noted claimant's current inability to work was based on his back restrictions associated with the 2010 injury. Respondent asserted it would still accommodate claimant's left knee restrictions, but for the fact he was unable to work due to his prior, permanent back restrictions. Respondent cited K.S.A. 2013 Supp. 44-510c(b)(2)(A-C) to show why claimant was not eligible for TTD.

At the October 9 preliminary hearing, the parties advised the judge that respondent was going to authorize a physician to operate on claimant's knee. The judge was told claimant technically had not been terminated for cause and was still an employee. Respondent's counsel asserted claimant was not working because of his unrelated low back restrictions which could not be accommodated, not because of the 2014 left knee injury and associated restrictions. Claimant's counsel asserted his client had worked at respondent without any need for back restrictions and underwent respondent's testing showing he was able to perform his work, including lifting and stooping.

The judge's Order partially states:

The Respondent submitted a statement from its Safety Manager saying that the Respondent could have accommodated the Claimant's work restrictions from Dr. Heger pursuant to the Respondent's Restrictive Duty Program but for the Claimant's separation from employment.

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<sup>1</sup> Clmt Depo., Ex. 1.

<sup>2</sup> P.H. Trans., Resp. Ex. B.

<sup>3</sup> *Id.*, Resp. Ex. D.

K.S.A. 44-510c(b)(2) sets forth relevant provisions regarding TTD. The statute says that temporary total disability exists when the employee is temporarily unable to work. It says the employee is entitled to TTD if the employer cannot accommodate restrictions imposed by the authorized physician. If the employee is terminated for cause then no TTD is owed.

The primary issue is termination for cause. The Court finds that the Claimant was not terminated or placed on leave for cause. The Respondent hired the Claimant with his preexisting restrictions. There is no evidence that the Respondent checked his restrictions or that the Claimant misrepresented his preexisting condition. The Claimant worked at the Respondent's facility without accommodation for over a year. It was apparently only after the Claimant had a workers compensation accident that the Respondent checked the Claimant's preexisting records and decided that he was not fit to work.

The Claimant's request for TTD is granted.

Respondent appealed.

#### **PRINCIPLES OF LAW**

K.S.A. 2013 Supp. 44-510c(b)(2)(C) states:

If the employee has been terminated for cause . . . following a compensable injury, the employer shall not be liable for temporary total disability benefits if the employer could have accommodated the temporary restrictions imposed by the authorized treating physician but for the employee's separation from employment.

K.S.A. 2013 Supp. 44-534a(a)(2) states, in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review. . . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

K.S.A. 2013 Supp. 44-551(l)(2)(A) states, in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a, and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 2013 Supp. 44-534a(a)(2) grants a judge jurisdiction to decide issues concerning payment of medical compensation and temporary total disability compensation. K.S.A. 44-534a also specifically gives the judge authority to grant or deny the request for TTD compensation pending a full hearing on the claim. "Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly."<sup>4</sup>

Not every alleged error in law or fact is subject to review. On an appeal from a preliminary hearing Order, the Board can review only allegations that the judge exceeded his or her jurisdiction under K.S.A. 2013 Supp. 44-551 and issues listed in K.S.A. 2013 Supp. 44-534a(a)(2) as jurisdictional issues, which are: (1) did the worker sustain an accident, repetitive trauma or resulting injury; (2) did the injury arise out of and in the course of employment; (3) did the worker provide timely notice; and (4) do certain other defenses apply. "Certain defenses" refer to defenses which dispute the compensability of the injury.<sup>5</sup>

### ANALYSIS

Claimant did not raise jurisdiction as an issue, but such omission does not expand the Board's statutorily-limited jurisdiction.<sup>6</sup> Jurisdiction may be raised at any time, even by the Board.

Respondent argues the judge erred in ordering TTD because such ruling was premised only on claimant being eligible for TTD because he was not terminated for cause, when in reality, claimant had not yet been terminated. Respondent states, "The ALJ's preliminary order granting TTD benefits is an advisory opinion that claimant will be eligible for TTD based upon his potential future termination. The ALJ lacked jurisdiction and authority to determine claimant's eligibility for TTD benefits based upon his termination from employment that has not yet occurred, and may never occur."<sup>7</sup>

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<sup>4</sup> *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

<sup>5</sup> See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

<sup>6</sup> "[S]ubject matter jurisdiction is a question that may be raised at any time, whether for the first time on appeal or even on an appellate court's own motion." *Shipe v. Pub. Wholesale Water Supply Dist. No. 25*, 289 Kan. 160, 166, 210 P.3d 105 (2009). See also *Gannon v. State*, 298 Kan. 1107, 319 P.3d 1196 (2014).

<sup>7</sup> Respondent's Appeals Board Brief at 4.

This Board Member concludes the judge did not exceed his jurisdiction in ordering payment of TTD for a compensable injury. Awarding TTD is within the judge's authority. Additionally, the judge did not actually state claimant's employment with respondent had been terminated. The judge also noted claimant may have been placed on leave. In any event, the judge's following statement is factually accurate: "The Court finds that the Claimant was not terminated or placed on leave for cause." Such statement does not mean the judge made an unsubstantiated factual finding that claimant had been terminated, but because such termination was not for cause, claimant was entitled to TTD. Rather, it appears the judge was rejecting any potential argument from respondent that K.S.A. 2013 Supp. 44-510c(b)(2)(C) precludes benefits.

This Board Member further concludes whether claimant meets statutory criteria to be awarded TTD, including whether he was terminated for cause, and is thus not entitled to TTD benefits, is not a jurisdictional issue listed in K.S.A. 2013 Supp. 44-534a(a)(2). As such, the appeal is dismissed.

#### **CONCLUSIONS**

The judge did not exceed his jurisdictional authority. The Board does not have jurisdiction to hear respondent's appeal.

**WHEREFORE**, the appeal of the Order is dismissed.<sup>8</sup>

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of November, 2014.

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HONORABLE JOHN F. CARPINELLI  
BOARD MEMBER

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Honorable Gary K. Jones

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<sup>8</sup> By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.